

EXHIBIT 5

K93TSTAC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 STATE OF NEW YORK, et al.,

4 Plaintiffs,

5 v.

20 CV 5770 (RCW) (PWH) (JMF)

6 DONALD J. TRUMP, *in his*
7 *official capacity as President*
of the United States, et al.,

8 Defendants.

9 -----x

New York, N.Y.
September 3, 2020
10:00 a.m.

11 Before:

12 HON. RICHARD C. WESLEY,
13 Circuit Judge

14 HON. PETER W. HALL,
15 Circuit Judge

16 HON. JESSE M. FURMAN,
District Judge

17
18 APPEARANCES (Telephonic)

19 OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL
Attorneys for Governmental Plaintiffs
20 BY: JUDITH VALE

21 AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Attorneys for NGO Plaintiffs
22 BY: DALE HO

23 U.S. DEPARTMENT OF JUSTICE
OFFICE OF SOLICITOR GENERAL
24 Attorneys for Defendants
25 BY: SOPAN JOSHI

SOUTHERN DISTRICT REPORTERS, P.C.

K93TSTAC

(Via telephone)

JUDGE FURMAN: Good morning and welcome. Since the panel is now here, we can get started.

Let me go over a few ground rules before we take appearances. First, this is Judge Furman. Let me ask that if you're not speaking that you mute your line, although remember to unmute yourself if you want to say anything, and I will do the same when I'm not speaking.

I will also try to model this, but I would ask that anytime anyone says anything, please begin by saying your name, just so that the court reporter and the Court know who is speaking and that is clear. There shouldn't be any chimes during our call. In theory, everybody who is on the speaking line should already be here, but if you hear a chime and you're speaking, just pause for a moment so that I can take stock of who has either joined or left, as the case may be, and make sure that everybody is still with us.

A reminder to everyone, whether you're on the listen-only line or the speaking line, that you are prohibited from recording this conference, and a reminder, of course, that it is a public conference as it would be if it were being held in open court.

With that, I will take appearances from counsel, beginning with counsel for the plaintiffs.

Let me start with the governmental plaintiffs.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

K93TSTAC

1 MS. VALE: Yes, your Honor, this is Judith Vale for
2 the governmental plaintiffs.

3 JUDGE FURMAN: Good morning, Ms. Vale.

4 And for the NGO plaintiffs?

5 MR. HO: Good morning, your Honors, Dale Ho for the
6 non-governmental plaintiffs.

7 JUDGE FURMAN: Good morning to you.

8 And finally for the defendants?

9 MR. JOSHI: Good morning, your Honor, Sopan Joshi for
10 the defendants.

11 JUDGE FURMAN: Good morning to you and Mr. Ho as well.

12 All right. With that, unless my colleagues have
13 anything they want to add by way of preliminaries, I think we
14 can get started. As indicated in our order, basically each
15 side will have something in the neighborhood of 20 to 30
16 minutes. I don't think that we need to set a strict time limit
17 per se, but hopefully we will continue along if it's helpful to
18 us.

19 We'll begin with the plaintiffs since they filed the
20 initial motion. I think you can probably guess from some of
21 our questions that you should focus in the first instance on
22 the jurisdiction and justiciability issues of standing and
23 ripeness. Those are obviously threshold issues in any event,
24 but if you want to begin by addressing those, I think that
25 would be helpful.

K93TSTAC

1 Before you do that, let me check with Judges Wesley
2 and Hall to see if there's anything that they want to say
3 before I turn it over.

4 Judge Hall?

5 JUDGE HALL: Nothing for me. Thank you, Judge Furman.

6 JUDGE FURMAN: And Judge Wesley?

7 JUDGE WESLEY: No, I'm fine. Thank you very much,
8 Judge Furman.

9 JUDGE FURMAN: I don't know, Mr. Ho or Ms. Vale, which
10 of you intends to go in the first instance, but I will turn it
11 over to one of you.

12 MS. VALE: Yes, your Honor, this is Judith Vale for
13 the governmental plaintiffs.

14 If the Court is amenable, I would like to start with
15 the justiciability issues for the apportionment harms, and
16 particularly with ripeness. And then I will turn it over to
17 Mr. Ho for justiciability issues on the census count harms,
18 including traceability and redressability, and then turn to
19 merits with myself addressing constitutional apportionment
20 claims. And then I will turn it back to Mr. Ho for the
21 statutory claims plus the Courts' questions about scope of
22 relief, and we would also appreciate an opportunity for a short
23 rebuttal on the summary judgment motion.

24 JUDGE FURMAN: All right. You may proceed.

25 MS. VALE: Thank you, your Honor. This case is ripe

K93TSTAC

1 because plaintiffs are substantially likely to be injured by
2 the categorical and blatantly unconstitutional exclusion of
3 undocumented immigrants from the apportionment base. That
4 likely injury provides standing and constitutional ripeness,
5 and there is no prudential reason for the Court to wait to
6 decide the purely legal questions presented rather than
7 resolving them now and preventing the injury and disruption and
8 uncertainty that will otherwise hang over the apportionment of
9 seats in the House of Representatives and the plaintiffs'
10 redistricting processes.

11 The memorandum itself makes clear that at least some
12 of the plaintiffs are substantially likely to lose House seats
13 and Electoral College electors by the subtraction of
14 undocumented immigrants from the apportionment base. As the
15 memo says, that is defendants' express intention, to have some
16 states with many undocumented immigrants lose House seats.

17 And the memo itself predicts that excluding
18 undocumented immigrants will likely result in California losing
19 at least one seat. The same result is exceedingly likely in
20 Texas. Defendants' own predictions are enough for ripeness,
21 but the undisputed declaration of Dr. Warshaw confirms that
22 there is a 98 percent likelihood that Texas will lose a seat, a
23 72 percent likelihood that California will lose a seat, and a
24 70 percent likelihood the New Jersey will lose a seat.
25 Defendants have provided no evidence to rebut that, so there is

K93TSTAC

1 no issue of disputed fact here about the substantial likelihood
2 of injury.

3 That's more than enough for ripeness, because
4 substantial likelihood is enough, as the Supreme Court and this
5 Court has made clear in cases like *Department of Commerce* and
6 *House of Representatives*, the latter of which was decided on a
7 summary judgment motion before the census or apportionment had
8 happened. Those cases make clear that a predicted future
9 injury is enough as long as it's substantially likely. You do
10 not need a literal certainty, just enough to have a concrete
11 rather than purely hypothetical stake in the matter.

12 JUDGE FURMAN: Let me stop you, Ms. Vale. This is
13 Judge Furman.

14 Number one, do you agree that those harms could be
15 remedied after the President submits his report to Congress, as
16 was the case for instance in *Utah v. Evans*; and number two, are
17 you not ignoring the language in the Presidential Memorandum
18 that directs the Secretary of Commerce to provide information
19 only if it is, quote, unquote, "feasible?" That is to say, we
20 don't yet know whether and to what extent he will provide the
21 information being requested.

22 MS. VALE: To take the first question first, your
23 Honor, while the plaintiffs think that it is at least possible
24 for the Court to provide relief after January, it's not certain
25 that defendants agree. It seems like there will at least be a

K93TSTAC

1 substantial question as to whether and how long it would take
2 defendants to fix the apportionment after the fact, given that
3 they are here arguing that no injunction can be issued against
4 the President at all. Under their theory, it seems like the
5 case cannot be ripe until the President issues his report. But
6 once he does so it is at least unclear how the Court will
7 provide effective relief without ordering the injunction that
8 defendants say is not possible.

9 But even assuming that it is possible, as we think, to
10 get relief, that's not the standard for ripeness. Even though
11 it might be possible to get relief, there will still be
12 hardship and disruption and uncertainty to plaintiffs and the
13 public because plaintiffs' redistricting processes start right
14 after the apportionment reports go out. The data to the States
15 starts to roll out in February. By statute, all the data has
16 to be out by March, and States can and do start at that point a
17 long process that has many steps that will be disrupted if it
18 turns out that everyone is working off an unconstitutional
19 apportionment.

20 And by "disruption," I mean for example that States
21 like New York and California have robust public participation
22 processes that are required that involve public meetings in
23 cities and counties all around the State, opportunities for the
24 public to send in maps based on the apportionment that has been
25 done. In New York, the public needs to receive draft maps that

K93TSTAC

1 the officials have done. And this is all real work that takes
2 time and resources and is important for the legitimacy of the
3 process.

4 JUDGE WESLEY: Ms. Vale, this is Judge Wesley. But
5 that's not to say, having once participated in a redistricting
6 process in a former life of the legislature, it's necessarily
7 pleasant and often long and drawn out, but that's not to say
8 that because these things are difficult that they couldn't be
9 done if a court at some point in time ultimately said that the
10 numbers that the Secretary of Commerce propose or identifies to
11 send to the President would constitute *ultra vires* or
12 inappropriate data from which the President could then perform
13 his ministerial functions, would it?

14 What keeps us from waiting, from a prudential
15 standpoint, waiting until the Secretary of Commerce comes up
16 and says "Okay, Homeland Security tells me there are 1.5
17 illegal aliens living in so and so," and then isn't it crystal
18 clear to everybody what the nature of the dispute is and
19 whether that number could or could not be used by the
20 President?

21 MS. VALE: Yes, your Honor, this is Judith Vale. I
22 agree that it might still be physically possible to redistrict
23 again and start the process again if it needs to be changed,
24 but there would be substantial hardship and disruption to the
25 process. And when we're talking about ripeness, especially in

K93TSTAC

1 an area like redistricting, which is critical for elections,
2 there's a strong principle in cases like *Purcell* that we should
3 resolve these disputes earlier rather than later before we
4 start getting even close to deadlines because so many
5 stakeholders, including officials and candidates and residents,
6 need more time rather than less, or at least benefit from more
7 time rather than less.

8 Turning to the issue --

9 JUDGE WESLEY: Excuse me, this is Judge Wesley again.
10 Did the States identify any injuries to them from the census
11 undercount other than with regard to reapportionment?

12 MS. VALE: Yes, your Honor. The undermining of the
13 census count itself also harms the State, the undermining that
14 is happening right now because of the memorandum, because
15 States use the census data to do redistricting and for many
16 other things as well.

17 JUDGE WESLEY: Wait a second. Federal funds with
18 regard to clean waters, federal funds with regard to
19 transportation, highway/bridge repair, all kinds of local aid
20 that goes out from the State that is funneled through the State
21 is premised on census data, isn't it?

22 MS. VALE: Many things are premised on census data,
23 correct.

24 JUDGE WESLEY: I don't understand then why the census
25 count isn't a more immediate injury to you as opposed to the

SOUTHERN DISTRICT REPORTERS, P.C.

K93TSTAC

1 reapportionment.

2 MS. VALE: I agree that the census count harm is more
3 immediate in time and quite serious because so many things flow
4 from the census count. I will defer I think to my colleague
5 Mr. Ho on some of the issues about the census count harm, but I
6 certainly agree that that is also a very immediate and serious
7 injury that also provides both standing and ripeness, and that
8 needs to be resolved as soon as possible.

9 And I do want to touch on two other things. Going to
10 Judge Furman's second question about defendants' speculation
11 that they might not be able to do what the President has
12 directed, the possibility that defendants might do a bad job at
13 doing what the President has commanded is not the type of
14 future contingency that can defeat ripeness. The memorandum
15 says, quote, "It is the policy of the United States to exclude
16 from the apportionment base aliens who are not in a lawful
17 immigration status." It is not a suggestion to do research
18 about this, it is a final policy and a directive from the
19 President, and defendants admit that they are doing everything
20 that they can to exclude all undocumented immigrants. Dr.
21 Abowd's declaration says that the Census Bureau is working on
22 implementing this right now. Director Dillingham testified to
23 the same in Congress. This is what they want to do, they want
24 to exclude all undocumented immigrants, not a sliver.

25 Now it is always possible that the government, having

SOUTHERN DISTRICT REPORTERS, P.C.

K93TSTAC

1 made a final decision, may change course later if it turns out
2 that what they have finally decided to do turns out not to be
3 feasible. That's always a possibility, and it does not
4 undermine ripeness. And the courts have made that clear in
5 cases like *Central Delta* and this Court's decision in
6 *Department of Commerce* where OMB had to review the citizenship
7 question and could have rejected it, could have said we're not
8 doing this. But that didn't undermine ripeness because
9 Secretary Ross had already made that decision. That decision
10 was effected and was being implemented. And the same thing is
11 true here. Even if it's possible that defendants might abandon
12 it if it turns out that they can't do what they want to do, the
13 President has already decided that this is the final policy and
14 defendants are already implementing it.

15 JUDGE FURMAN: Let me interject. I would say, unless
16 my colleagues have additional questions on this round, I would
17 propose that we shift gears and let Mr. Ho address the census
18 harms.

19 Let me check with Judge Wesley, any further questions
20 from you?

21 JUDGE WESLEY: I'm good, thank you.

22 JUDGE FURMAN: Judge Hall?

23 JUDGE HALL: Thanks, I'm fine.

24 JUDGE FURMAN: So with the apologies to you, Ms. Vale,
25 let me turn to Mr. Ho and pick up with the second serious harm.

K93TSTAC

1 Go ahead, Mr. Ho.

2 MR. HO: May it please the Court, Dale Ho on behalf of
3 the non-governmental plaintiffs.

4 The defendants' policy of excluding undocumented
5 immigrants from the census is causing ongoing injury to the
6 plaintiffs because it is deterring census responses now. By
7 undermining the Census Bureau's core outreach message that
8 everyone counts in the census, that is degrading the quality of
9 census data that's used for a wide variety of purposes, and
10 it's causing our clients, in particular seven immigrant sites
11 organizations, to divert resources to combat these negative
12 effects, resources that could be rerouted to other
13 organizational priorities. These facts establish standing
14 under the Supreme Court's decision in the citizenship question
15 case last year where the Court held that injury due to
16 government action that predictably reduces census responses is
17 traceable back to the government and redressable via an
18 injunction. Not a single justice dissented on that point.

19 And because these census count injuries are occurring
20 now, we seek immediate relief from this Court. We believe that
21 summary judgment on standing is appropriate, as these injuries
22 are not genuinely disputed given the absence of contrary
23 evidence about the quality of the census count. And for
24 purposes of appellate review, we would also request that this
25 Court further find that if preliminary fact finding is

K93TSTAC

1 necessary on these threshold issues that the preponderance of
2 the evidence establishes standing on the basis of this census
3 count injury.

4 If I could go into a bit more detail, there's really
5 no genuine dispute that the Presidential Memo is suppressing
6 census responses now. There are two reasons why it's doing
7 that. The first is that it communicates directly that census
8 participation is a futile act for undocumented immigrants. And
9 that sows confusion in the broader immigrant community and, as
10 I mentioned, undermines not only the Census Bureau's core
11 outreach message but the outreach work of non-governmental
12 organizations like the plaintiffs on whom the Census Bureau
13 relies to ensure an accurate count. Second, it triggers
14 mistrust in immigrant communities by signaling that lawful
15 status is a component of census participation.

16 Again, these two reasons that the Presidential Memo
17 undermines census participation are essentially uncontradicted
18 in the record. The former Census Bureau Director John
19 Thompson, who submitted two declarations on our behalf,
20 Exhibits 57 and 66, explains these points in some detail, as
21 well as declarations from our clients. Those are at Exhibits
22 14, 18, 26, 36, and 43. And I think it's somewhat ironic that
23 the government discounts their testimony kind of with a wave of
24 a hand, given that as Judge Furman found in your Honor's trial
25 decision last year, the Census Bureau itself relies on

SOUTHERN DISTRICT REPORTERS, P.C.

K93TSTAC

1 organizations like the NGO plaintiffs to ensure a successful
2 census.

3 And it's not just our clients' testimony. The notion
4 that excluding undocumented immigrants from the census will
5 harm the accuracy of the census is actually consistent with the
6 defendants' own longstanding position going back decades. As
7 far back as 1989, Commerce Secretary Mosbacher wrote a letter
8 to Congress opposing an effort to exclude undocumented
9 immigrants from the census, noting that it would, quote,
10 "jeopardize the accuracy of the census." We neglected to cite
11 that in our brief, but it is referenced in our amended
12 complaint with a hyperlink to the letter at paragraph 171. And
13 just a few weeks ago, former Census Bureau Director Vincent
14 Barabba, who oversaw the 1980 census, testified before Congress
15 that immigrants will be, quote, "less likely to fill out the
16 census because of the Presidential Memo." That's cited in
17 paragraph 173 of our amended complaint.

18 And the timing for this couldn't be worse. The
19 enumeration period is set to end at the end of this month. So
20 these injuries are occurring now, they're degrading the quality
21 of the census data now, and we need immediate relief from this
22 Court to avoid those injuries.

23 JUDGE FURMAN: Mr. Ho, this is Judge Furman. Let me
24 jump in and ask you to address the issues of traceability and
25 redressability, which obviously are independent requirements

K93TSTAC

1 for standing. The defendants argue that the harms that you're
2 describing are not traceable to the memorandum but rather the
3 misreporting about the memorandum. That is, in essence, the
4 argument.

5 And number two, particularly to the extent that you're
6 relying on the diversion of resources needed for the NGOs to
7 convey the message that everybody does in fact count, et
8 cetera, would a judicial ruling in your favor actually redress
9 that harm, and would you actually need to spend more when your
10 organizations have to divert even more resource to essentially
11 make sure that everybody was aware of the Court's ruling and
12 that everybody does count?

13 MR. HO: Thank you for those questions, Judge Furman.
14 With respect to the question of traceability, the Supreme Court
15 explained in *Lujan* that traceability simply requires a causal
16 connection between the government's challenged action and the
17 injury that the plaintiffs are asserting. And as the Supreme
18 Court held in the citizenship question case last year, the
19 predictable effect of government action on the decisions of
20 third parties is traceable back to the government. There was a
21 citizenship question which predicably reduced census
22 participation. Here it's the decision to exclude undocumented
23 immigrants. Again, that's a predictable outcome of the
24 government taking an official position that census
25 participation for undocumented immigrants is a futile act

K93TSTAC

1 because the core purpose of the census, the apportionment of
2 political representation, the participation of undocumented
3 immigrants will ultimately be irrelevant to that core
4 constitutional function of the census. It not only
5 communicates futility to them, it creates confusion in the
6 broader community about whether or not census participation is
7 actually required for everyone, because the Census Bureau's
8 core message has been everyone counts in the census
9 unequivocally, categorially, and now there's a lot of
10 widespread confusion about that.

11 I don't think that's because of media misreporting,
12 but even if this Court were to determine that there were other
13 factors that were contributing to the effect of the
14 Presidential Memo on census responses, that wouldn't destroy
15 traceability. As your Honor put it in your trial decision,
16 even in a dry season it is fair to trace the fire to arsonist.
17 The Presidential Memo is undoubtedly the cause of the reduction
18 in census participation that our clients testified about in
19 their declarations, and that's supported by not just the former
20 Census Director John Thompson's declaration, but also the
21 declaration of political scientist Matt Barreto, on whom we
22 relied at trial last year.

23 If I could turn to your second question, these
24 injuries are also redressable here. In order for a plaintiff
25 to establish redressability the Supreme Court explained in

K93TSTAC

1 *Larson v. Valente* that the relief requested will remedy, quote,
2 "an injury to the plaintiff, not every injury to the
3 plaintiff."

4 And two basic facts establish redressability here.
5 First, as Former Bureau Director Thompson testified, enjoining
6 the Presidential Memo would mitigate its damage and, quote,
7 "improve the effectiveness of census outreach efforts." That's
8 in his supplemental declaration at Exhibit 66. And then the
9 supplemental declarations of three of our clients, Exhibits 62
10 through 64, all indicate that if their outreach were made more
11 effective because of an injunction against the Presidential
12 Memo, that would free up significant time and resources that
13 could then be rerouted to their pre-existing organizational
14 priorities, such as Covid relief.

15 Now these facts, they're not genuinely disputed by the
16 defendants. There isn't any evidence that the defendants have
17 put in, for example, that the Presidential Memo is having no
18 effect on census outreach efforts. And I think that's telling.
19 The Census Bureau represents I think repeatedly throughout
20 litigation that the decennial census is the largest peacetime
21 mobilization of federal personnel that the country engages in.
22 There are census takers all throughout the country right now
23 and field operation supervisors out there. And it's I think
24 telling that not a single one of them has submitted a
25 declaration saying that the Presidential Memo hasn't affected

SOUTHERN DISTRICT REPORTERS, P.C.

K93TSTAC

1 their work in any way. The only thing we have is a declaration
2 from Mr. Lamas who says that the Census Bureau isn't changing
3 its operation in any way in response to the Presidential Memo.
4 But I think that only shows precisely why what the Census
5 Bureau is doing right now is inadequate to mitigate the damage
6 of the Presidential Memo because they're not doing anything to
7 account for the deterrent effect that the memo is having.

8 JUDGE HALL: Mr. Ho, this is Judge Hall. Could you
9 address, for me at least, why the burden that the NGOs have
10 taken on with respect to the census, which are causing them now
11 as a result of the memorandum as alleged and supported by data,
12 causing them to do more work, why that isn't a self-imposed
13 burden?

14 MR. HO: Thank you, Judge Hall.

15 JUDGE HALL: Why they couldn't just shift their
16 resources anyway to deal with Covid cases and those sorts of
17 things.

18 JUDGE FURMAN: Mr. Ho, hold on one second. This is
19 Judge Furman, and let me just add to that the following
20 question, which is: Could we rely solely on the diversion of
21 resources, a *Havens Realty* theory of standing, if you will, in
22 the wake of *Clapper*, or does *Clapper* not stand for the
23 proposition that the expenditure of resources is a
24 self-inflicted harm unless it is intended to prevent a harm
25 that would itself constitute Article III injury?

SOUTHERN DISTRICT REPORTERS, P.C.

K93TSTAC

1 MR. HO: Thank you, Judges Hall and Furman. If I
2 could start by addressing Judge Hall's question, the notion
3 that the diversion of resources to account for the deterrent
4 effect of the government's action on census responses, the
5 notion that that is a form of self-inflicted injury. I think
6 the Supreme Court's decision in the citizenship question
7 litigation last year forecloses that particular argument.
8 Advocacy on behalf of immigrants and immigrant communities is a
9 central core aspect of our clients' missions. That work has
10 been made harder by virtue of the government's action. And
11 under *Havens Realty*, the diversion of resources from other
12 organizational priorities in order to account for the negative
13 effects of government action, that's cognizable injury and it's
14 not deemed self-inflicted.

15 In response to your question, Judge Furman, about
16 whether or not *Clapper* changes the equation there, I don't
17 think it does. *Clapper* did not overrule *Havens Realty sub*
18 *silentio*. I think what *Clapper* is best understood as stating
19 is that resource diversion is not a cognizable injury where
20 it's in response to a speculated or assumed harm. In *Clapper*,
21 the plaintiffs didn't know whether or not they were actually
22 being surveilled by the government, they simply assumed that
23 they were and diverted resources to try to account for that.

24 Here, by contrast, there isn't any speculation about
25 the need for resource diversion, and there are two reasons why

K93TSTAC

1 that's the case. The first is that the deterrent effect on
2 census responses is happening now. It's being observed now in
3 the communities where census outreach is happening. It's not
4 something that is speculated or assumed. And second, the
5 government's policy is not speculated or assumed, it's
6 unequivocal and categorical that the policy of the United
7 States is to exclude from the apportionment base aliens who are
8 quote, "not in lawful status under the INA," and it's being
9 implemented now, as the government's own submissions indicated.

10 And I think in response to the third bullet point from
11 the Court's order as to whether or not the underlying harm for
12 which the plaintiffs are diverting resources, whether or not
13 that underlying harm itself must be sufficiently imminent and
14 impending to satisfy Article III requirements, I don't think it
15 does, because as Judge Furman noted in your Honor's trial
16 decision last year, it would be illogical to recognize that
17 organizations may be injured and have cognizable standing by
18 virtue of expenditures, but only in cases where that would be
19 superfluous because they're also suffering a separate
20 underlying injury which itself satisfies Article III
21 requirements.

22 Organizational plaintiffs asserting *Havens Realty*
23 standing have never been required to do that. The plaintiffs
24 in *Havens Realty* itself did not suffer an underlying cognizable
25 injury for which they diverted resources. That case I believe,

K93TSTAC

1 as I'm sure the Court recalls, was a case about housing
2 discrimination. The plaintiffs themselves did not suffer from
3 housing discrimination but they were first forced to divert
4 resources in order to respond to a pattern of housing
5 discrimination in their community. And the Supreme Court held
6 and has not since departed from the holding that that kind of
7 resource version is cognizable, it's traceable to challenged
8 conduct, and it's redressable by an injunction blocking that
9 conduct.

10 JUDGE WESLEY: Mr. Ho, this is Judge Wesley. In light
11 of your answer there, where do we look and what assurances do
12 the NGO plaintiffs make with regard to the fact that an
13 injunction would somehow remedy the situation and thwart the
14 undercount in any significant way? And how significant need it
15 be for it to meet the test of redressability?

16 MR. HO: Well, I don't think there's a bright line
17 that the Court can point to below which a certain percentage of
18 the injury would somehow defeat standing. I would just look to
19 Supreme Court's language in *Larson v. Valente* that as long as
20 an injury to the plaintiff is remedied, that establishes
21 redressability. We don't have to redress every injury to the
22 plaintiff. In *Larson* the plaintiffs were religious
23 organizations who challenged one of several requirements to
24 obtain a religious organization exemption from certain
25 governmental reporting requirements. The defendants argued

K93TSTAC

1 look, if the court enjoins one of these requirements, the
2 plaintiffs will still have to satisfy all of the other ones.
3 There's no guarantee they will be able to do that, they may end
4 up in the same place as a practical matter even after relief is
5 ordered. And the Supreme Court held: Look, that doesn't
6 defeat redressability. Their job is now easier, and they may
7 not ultimately obtain the religious organization exemption, but
8 it will be easier for them to do so and that is meaningful
9 relief.

10 And I think the same holds true here. We have
11 uncontroverted testimony from a former director of the Census
12 Bureau who says census outreach will be made easier if this
13 Court issues declaration that it is unlawful under federal law
14 to exclude undocumented immigrants from the census count. And
15 we have three declarations, the supplemental declarations that
16 I mentioned earlier at Exhibit 62 through 64 from three of our
17 clients, FIEL in Texas, Make The Road in New York, and ARI in
18 Southern California, all of them stating that if their census
19 outreach efforts could be more effective in the remaining
20 non-response follow-up period that would not only help them
21 advance their organizational missions but it would free up a
22 significant amount of staff time and resources which they could
23 then reroute to their existing programmatic work.

24 JUDGE FURMAN: Thank you, Mr. Ho. Unless my
25 colleagues have any other questions, I propose that we move on

SOUTHERN DISTRICT REPORTERS, P.C.

K93TSTAC

1 to next area, which I think is the merits.

2 But let me check, Judge Wesley, anything from you?

3 JUDGE WESLEY: No, thank you very much.

4 JUDGE FURMAN: Judge Hall?

5 JUDGE HALL: Thank you, I'm fine.

6 JUDGE FURMAN: All right. So I think Ms. Vale had
7 said that she was going to address the constitutional issues,
8 if I remember correctly.

9 MS. VALE: Yes, Judge Furman, I will. If I could add
10 just one new thing on the census count harm that I just want to
11 stress, which is that it is not just diversion of resources
12 that is a harm from the census count harm, but also, as Judge
13 Wesley was suggesting, much funding for many, many programs
14 with federal funding comes from the census count, and that
15 flows through the states and then to the counties who are
16 plaintiffs here. And the census data is also used for
17 redistricting. So there are severe harms that do come from the
18 census count in addition to diversion of resources, and that
19 injury is shown through the detailed declaration that
20 defendants have not even tried to capture.

21 JUDGE FURMAN: This is Judge Furman. Let me ask you a
22 question on the merits, sort of threshold question, which is
23 that both sides have focused on the constitutional claims and
24 arguments, but shouldn't we first look at the statute? And if
25 we can decide the case on statutory grounds without needing to

K93TSTAC

1 reach constitutional issues, shouldn't we do that?

2 And to the extent there is any doubt about how to
3 construe the statute, should the doctrine of constitutional
4 avoidance not play some role?

5 MS. VALE: Yes, your Honor, this is Judith Vale.
6 Certainly if the Court thinks that excluding all undocumented
7 immigrants -- I might agree that it does, that that is another
8 basis to invalidate this memorandum, but we don't think that
9 the principle of constitutional avoidance holds that much sway
10 here for a couple of reasons. One is, as mentioned before,
11 because we are talking about something as important as
12 redistricting that affects elections, there is also a strong
13 legal principle that those decisions should be decided early
14 and that we shouldn't wait or hesitate to resolve issues that
15 affect something like elections. And I think that principle
16 sort of counteracts constitutional avoidance here.

17 And we don't think this is a difficult constitutional
18 question. We think that the categorical exclusion of
19 undocumented immigrants who undisputedly live here blatantly
20 violates the Constitution and the Census Act. As this Court
21 said in *Department of Commerce*, the Constitution requires the
22 apportionment base to include every single person residing
23 here, whether living here with legal status or without. And
24 that command in the Constitution is crystal clear from the
25 terms of the 14th Amendment which requires the inclusion of the

K93TSTAC

1 whole person of numbers in each state, and more than 200 years
2 of history, practice, judicial precedent, including the *Evans*
3 decision and defendants' own representations in past
4 litigation.

5 Defendants simply have no authority, no discretion to
6 subtract millions of undocumented immigrants even though they
7 have every indicia of usually residing here. They in fact do
8 live here most of the time. They have done so for a long time.
9 For example, DHS estimated that in 2015 9.6 million
10 undocumented immigrants have lived in the United States for
11 more than ten years. Millions of these undocumented immigrants
12 intend to keep living here, and in fact will keep living here,
13 even if defendants wish that it were otherwise.

14 And defendants themselves are going to make the
15 essentially factual finding under the residence rule that
16 millions of undocumented immigrants do usually reside here, and
17 they are going to count them in the actual enumeration because
18 they usually reside here. And the memorandum is directing
19 defendants to simply ignore all of that, simply disregard that
20 millions of undocumented immigrants usually reside here, ignore
21 that, even though it is the lodestar of the 14th Amendment and
22 apportionment, and subtract them based solely on their
23 undocumented status. And that is just blatantly --

24 JUDGE FURMAN: Let me interrupt, this is Judge Furman.
25 Could you address the defendants' argument that you are

K93TSTAC

1 bringing a facial challenge, and as such that you have to
2 demonstrate that it is unlawful to exclude essentially all
3 categories of illegal aliens, including, for instance, illegal
4 aliens apprehended at the border who are being held in
5 detention pending removal? Do you agree with that, and if you
6 don't, do you have authority that would support your
7 proposition on that front?

8 MS. VALE: We don't agree with that characterization
9 of this case at all. I think that characterization of this
10 sort of facial challenge is really getting this case precisely
11 backwards. We are challenging the memorandum that exists, and
12 the memorandum that exists says that it is the policy to
13 exclude all undocumented immigrants based on their lack of
14 immigration status. That is the action of the government that
15 is challenged here.

16 And so it is defendants that have to somehow justify
17 that categorical exclusion of everyone, including undocumented
18 immigrants who undisputedly live here. The memorandum is not
19 remotely targeted at folks who are physically crossing the
20 border on census day or who are in a car being transported back
21 over the border on census day. That is just not what this case
22 is about. And those kinds of sort of fringe hypotheticals, I
23 think it's no accident that what they're really talking about
24 are folks who, when maybe there is a serious question as to
25 whether they usually reside here, there could be a question as

SOUTHERN DISTRICT REPORTERS, P.C.

K93TSTAC

1 to whether someone who arrives yesterday usually resides here.
2 But those kinds of questions exist for folks who are
3 undocumented, who are legal permanent residents, or who are
4 citizens. And this case is not about that, because even
5 defendants agree they are going to decide that millions of
6 undocumented immigrants do live here. They usually reside here
7 and they are going to count them and then they're going to
8 exclude them anyway.

9 So that is what this case is about, and these fringe
10 examples I think are really a red herring and get this
11 backwards. What the memorandum is doing and declaring is
12 directing the defendants to do what the framers forbid. The
13 framers were very purposeful in requiring apportionment be
14 based on living here, on your usual residence, on your abode,
15 and you cannot ignore that and exclude people based only on a
16 legal status that doesn't have anything really to do with
17 whether you usually reside here or not.

18 And I would like to touch --

19 JUDGE FURMAN: This is Judge Furman. I was going to
20 check if Judge Hall or Judge Wesley have any questions, and
21 otherwise propose that we give Mr. Ho a little time to address
22 the statutory arguments.

23 JUDGE HALL: Not me, I'm good.

24 JUDGE WESLEY: No, that would be fine, thank you.

25 JUDGE FURMAN: All right. Mr. Ho, why don't you turn

K93TSTAC

1 to the statutes then.

2 MR. HO: Thank you, Judge Furman. Dale Ho for the
3 non-governmental plaintiffs.

4 13 USC 141 and 2 USC 2(a) set forth an interlocking
5 statutory structure governing the census and congressional
6 apportionment. The defendants have violated this statutory
7 scheme in two distinct respects. First, the statutes require
8 including the total population and the whole number of persons
9 in the apportionment base. That includes undocumented
10 immigrants, and defendants' arguments to the contrary just
11 torture the plain language of the statute.

12 Second, the statutes require using the decennial
13 census for apportionment, which in 2020 undisputedly includes
14 undocumented immigrants. That is, even if defendants were
15 correct that *ex ante* they have some discretion to exclude
16 certain populations of undocumented immigrants from the census,
17 this particular census does not exclude undocumented
18 immigrants, and defendants are under a ministerial duty to use
19 the actual census for purposes of apportionment.

20 If I could address that second argument for a moment,
21 the text of Section 141(b) clearly provides that the Commerce
22 Secretary in his report to the President must use, quote,
23 "total population for the apportionment," and that calculation
24 must be based on the decennial census. Section 2(a) provides
25 that the President's report to Congress must similarly use the

K93TSTAC

1 whole number of persons ascertained under the decennial census.

2 Now the legislative history to 1929 Census Act I think
3 makes very clear that once the census is complete there can
4 only be, quote, "one mathematical answer." That's from the
5 Senate report. So once the census is complete, the President
6 does not have discretion *ex post* to manipulate the census data
7 to his liking, add or subtract other kinds of data from the
8 census count and use different kinds of calculations to arrive
9 at a different apportionment number. The statutory and
10 constitutional function of the enumeration is that it is used
11 for apportionment, and if the President could simply revise or
12 alter the census results and adjust them as he sees fit after
13 the census is complete, there's no real limit on what he can't
14 do, as I think Justice Thomas' separate opinion in *Utah v.*
15 *Evans* goes to some length to explain why granting the President
16 that kind of discretion would be problematic.

17 To Judge Furman's first question about I think
18 resolving this case empirically on statutory grounds, the Court
19 could certainly look at the statutory claims first. We do
20 think, given the exigencies here and the likelihood of quick
21 appellate review if this Court were to rule quickly, that for
22 purposes of completeness of the record and to facilitate
23 appellate review the better course would be to resolve both
24 sets of claims, the statutory and constitutional ones.

25 JUDGE FURMAN: All right. Why don't we spend a few

K93TSTAC

1 minutes on the remedies and then we'll hear from defendants,
2 unless either Judge Hall or Judge Wesley have a question on the
3 statute.

4 So Judge Wesley?

5 JUDGE WESLEY: No, thank you.

6 JUDGE FURMAN: Judge Hall?

7 JUDGE HALL: Nothing here, thank you.

8 JUDGE FURMAN: All right. So I can't remember who was
9 planning to address the remedies questions, but let me start by
10 posing a question and whoever is addressing it can answer,
11 which is assuming that we agree with you on jurisdiction and
12 the merits and intend to grant some relief, do we need to
13 address the question of whether such relief would need to
14 extend to the President or would it not suffice to enter an
15 injunction barring the Secretary from sharing the information
16 with the President that he's directed to share in the memo?

17 And then let me actually throw out a second question
18 that you can address in the meantime. Defendants argue in a
19 footnote in their brief that such an injunction would violate
20 the opinions clause of the Constitution. Could you address
21 that as well?

22 MR. HO: Thank you, Judge Furman. In response to your
23 first question, we would agree that effective relief is
24 possible even without relief against the President, that this
25 Court could order an injunction which enjoins the other

K93TSTAC

1 defendants in this case from taking any action in furtherance
2 of the Presidential Memo's policy of excluding undocumented
3 immigrants from the census. That would provide us with
4 effective relief, but we do think that the better course would
5 be to order relief against the President. Declaratory relief I
6 think, for example, is available under Second Circuit precedent
7 under the *Knight Institute* decision affirming declaratory
8 relief against the President.

9 And with respect to injunctive relief, I would just
10 simply say that the defendants don't deny that if the
11 President's duties here are in fact ministerial, then an
12 injunction would be proper, and we think that the duty that the
13 President has that we're asserting he's violated are in fact
14 ministerial. There is a constitutional requirement to include
15 all people living in the United States. The President has no
16 discretion to depart from that. And there's a statutory duty
17 to use the census numbers for purposes of apportionment, which
18 the Supreme Court in *Franklin* noted is a, quote, "admittedly
19 ministerial task." So we think that relief against the
20 President is available, and we think it would be the better
21 course to sort of ensure the finality of relief that's
22 effective.

23 To your second question, Judge Furman, I think this
24 case could be different if the President's Memo had simply
25 directed the Census Bureau to conduct a research assignment,

K93TSTAC

1 tell us how many undocumented immigrants or non-citizens there
2 are in each state. But that's not what has happened here.
3 What happened here is the President has declared an official
4 policy of the United States which is unequivocal and in direct
5 contravention of the Constitution and statutory requirements.
6 And in that circumstance, the work that the defendants,
7 including Congress and the Census Bureau are undertaking in
8 furtherance of that memo, are properly enjoined. It could be a
9 different story with a different kind of directive from the
10 President, but that's just not the case that we're presented
11 with here.

12 JUDGE FURMAN: All right. Thank you.

13 Unless Judge Hall or Judge Wesley want to ask
14 anything, I think we can switch to defendants. Judge Wesley?

15 JUDGE WESLEY: Thank you very much.

16 JUDGE FURMAN: Judge Hall?

17 JUDGE HALL: Thank you. We're ready to switch to
18 defendants.

19 JUDGE FURMAN: All right. So Mr. Joshi, if you want
20 to pick it up and start with the issues of standing and
21 ripeness, please.

22 MR. JOSHI: Thank you, Judge Furman, and may it please
23 the Court.

24 The Court should dismiss this case at the outset
25 because plaintiffs don't have standing for any of the injuries.

SOUTHERN DISTRICT REPORTERS, P.C.

K93TSTAC

1 So let me just take them in order. I think the apportionment
2 injury is not imminent or even ripe for review because the
3 memorandum asks the Secretary to transmit information and a
4 second set of numbers, if you will, to the extent feasible and
5 the maximum extent feasible. And the Secretary has not yet
6 determined what is feasible or presented any information
7 breaking down what categories of aliens who don't have lawful
8 status under the INA could be accounted for and excluded from
9 the enumeration that would serve as the apportionment base.

10 In fact, I think plaintiffs in their complaint, and I
11 am looking here at paragraph 175 to 179 of the NGO plaintiffs,
12 amended complaint 137 to 141 of the governmental plaintiffs --

13 JUDGE WESLEY: Mr. Joshi, this is Judge Wesley. Are
14 you shuffling papers?

15 MR. JOSHI: No, I'm not.

16 JUDGE WESLEY: Someone is shuffling papers. If you
17 could stop.

18 JUDGE FURMAN: Judge Furman here. Just a reminder, if
19 you're not speaking -- and Mr. Joshi should be the only one
20 speaking at the moment -- place yourself on mute, please.

21 MR. JOSHI: Thank you, this is Sopan Joshi again.

22 So I think plaintiffs in their complaint have actually
23 alleged that it will prove completely infeasible to count and
24 exclude such aliens, in which case the two sets of numbers the
25 Secretary will present will be the same and there will be no

SOUTHERN DISTRICT REPORTERS, P.C.

K93TSTAC

1 apportionment injury at all. So in some ways --

2 JUDGE WESLEY: Mr. Joshi, this is Judge Wesley. I
3 don't know that that will deter the Secretary of Commerce. It
4 may present a difference of opinion with regard to whether the
5 numbers are in any way reliable, but isn't the law issue a
6 little bit more distinct already? What is indefinite about the
7 posited intent to exclude illegal aliens from the delivery of
8 numbers to the Congress? It's the policy of this
9 administration. What is indefinite about that? What's so
10 indefinite about that?

11 MR. JOSHI: So your Honor, I think what is
12 indefinite --

13 JUDGE WESLEY: It sounds definite to me.

14 MR. JOSHI: I'm sorry, I didn't catch that last part.

15 JUDGE WESLEY: I said it sounds definite to me.

16 MR. JOSHI: So the memorandum by its own terms and the
17 policy by its own terms is to exclude such aliens, quote, "to
18 the maximum extent feasible and consistent with the discretion
19 delegated to the executive branch." So the memorandum
20 statement of policy is itself self-limiting, and it includes a
21 condition of feasibility that the Secretary needs to determine
22 first.

23 JUDGE WESLEY: Let me ask you this: Is it your view
24 that the Secretary could get a number from the Department of
25 Homeland Security as a number of people currently subject to

SOUTHERN DISTRICT REPORTERS, P.C.

K93TSTAC

1 orders of removal in which their appeals have been exhausted
2 from the Bureau of Immigration appeals and/or any petitions
3 before the circuits, and that number of people, those people
4 still remain in the United States, could the Secretary get that
5 number and then deliver it to the President?

6 MR. JOSHI: So my understanding is yes, under the
7 Executive Order 13880.

8 JUDGE WESLEY: And in your view, that would not
9 violate Section 2(a), is that your view?

10 MR. JOSHI: So 2(a), we think the substantive standard
11 encompassed in 2(a) is identical to the constitutional
12 standard.

13 JUDGE WESLEY: So your answer is no, it doesn't
14 violate it then, is that it?

15 MR. JOSHI: If hypothetically that were what were done
16 then that may well be the case. I think our point on
17 standing --

18 JUDGE WESLEY: Stick with me on the question for a few
19 minutes, Mr. Joshi. Is it your view that that would not
20 violate Section 2(a)?

21 MR. JOSHI: Yes, that would be a proper exercise of
22 executive discretion to --

23 JUDGE WESLEY: So let me ask you this: Have you been
24 in touch with the Secretary of Commerce to determine to what
25 extent he has at the present time formulated methodologies with

K93TSTAC

1 regard to counting and those other agencies that he's contacted
2 persistent to the President's directive?

3 MR. JOSHI: The Secretary of Commerce has not yet
4 stated what he will or --

5 JUDGE WESLEY: I didn't ask you that question. I
6 asked if you have been in touch with him before this oral
7 argument to determine how far along that was such that you
8 could report to this Court how much more definite the Secretary
9 was with regard to his ability to fulfill the order of the
10 President?

11 MR. JOSHI: So we have been in touch with the Commerce
12 Department but we have not received any definite information as
13 to what will or won't be feasible at this time.

14 JUDGE WESLEY: You received no information -- you're
15 telling me right now as an officer of this Court you have
16 received no information with regard to any particular set of
17 figures that the Secretary proposes to deliver to the
18 President?

19 MR. JOSHI: That is correct. As I stand here today I
20 have not received that.

21 JUDGE WESLEY: All right. Thank you.

22 MR. JOSHI: And I think, given that uncertainty, we
23 think the dispute right now isn't ripe because we dispute
24 plaintiffs' characterization of the memorandum as being --

25 JUDGE WESLEY: Well, this is Judge Wesley again. Did

K93TSTAC

1 you receive an estimate as to when you might receive that
2 information?

3 MR. JOSHI: No, I have not, your Honor.

4 JUDGE WESLEY: Did you ask? The issuance of the order
5 is the person who determines the definiteness of this,
6 according to your theory. It's kind of easy to hide the ball,
7 isn't it?

8 MR. JOSHI: Fair enough, your Honor, but I point out
9 the Supreme Court's decision --

10 JUDGE WESLEY: The uncertainty can't be self-induced,
11 can it?

12 MR. JOSHI: Well, it can, in this sense, and let me
13 explain, if I might: The Supreme Court in *Franklin* made very
14 clear that the Secretary could deliver numbers for the very
15 first time at the deadline, December 31st, and the President
16 could turn around and say, "No, I disagree. I have a policy
17 disagreement with whom you decided to count or not count in
18 this enumeration, go back and redo the numbers."

19 JUDGE WESLEY: I will absolutely give you that,
20 Mr. Joshi. In fact, quite frankly, I agree with you. But what
21 about the census count itself, and what about the immediate
22 effect with regard to the diminution in the overall numbers and
23 the effect that that then has on agent localities, the types of
24 injuries that flow from that you yourself, your side doesn't
25 even contest?

K93TSTAC

1 MR. JOSHI: So I dispute that we don't contest it. So
2 if we're moving to the census count injury, I think first and
3 foremost it is simply not traceable or redressable under
4 *Clapper*. As even the citizenship question case last year and
5 even right now I think we all agree that that census count
6 injury would have to be traceable to the memoranda. And so
7 it's incumbent on plaintiffs here to identify some subset of
8 people who would not have been chilled and were not chilled
9 from answering the census between April 1st and July 21st, then
10 became chilled on July 21st after the memorandum was issued,
11 and then will be unchilled in the next 27 days by an order of
12 this Court that the government would vigorously contest and
13 that would remain reviewable on appeal.

14 JUDGE HALL: This is Judge Hall. How many people have
15 to be unchilled in order for your hypothetical or your
16 discussion to bear fruit and provide standing? One? If the
17 plaintiff showed one person was, "Ah-hah, I read this and now I
18 will answer the census," is that enough?

19 MR. JOSHI: It would have to to be non-speculative,
20 whatever the number is.

21 JUDGE HALL: One seems to be pretty non-speculative.

22 MR. JOSHI: But you would then, I would assume, have
23 to identify it and provide a reason and make sure that that is
24 actually fairly traceable to the memoranda. It can't just be
25 self-inflicted, as I think *Clapper* tells us. And *Clapper* also

K93TSTAC

1 tells us that governmental actions that don't directly, quote,
2 "regulate, constrain or compel any action" are simply not the
3 source, as a matter of law, as being the fairly traceable
4 source of an alleged injury.

5 JUDGE FURMAN: This is Judge Furman. Didn't you
6 effectively make and lose that argument in the citizenship
7 question litigation, that is to say, the theory of harm in the
8 citizenship question litigation was that people would not
9 respond to the census out of essentially fear that their
10 identities would become known to the government. That was
11 based on a misunderstanding or a misimpression that census
12 responses and census data would be available to immigration
13 authorities or the like, that is to say it was premised on a
14 misunderstanding. Yet both I and the Supreme Court found that
15 because there was a predictable effect on the third parties
16 that ultimately caused harm to the plaintiffs that that
17 sufficed for standing. So why does that argument not hold
18 here?

19 MR. JOSHI: For two reasons, Judge Furman. First is
20 that I think in that case it was still the question was: Is it
21 traceable to the citizenship question's inclusion on the form?
22 Here it's: Is it traceable to the memoranda? And the
23 difference between those two is that the census count injury
24 right now is happening in the middle of the census. So you
25 would have to show someone who was not chilled from April 1st

K93TSTAC

1 to July 21st and then became chilled, and then on
2 redressability would become unchilled in the next 27 days, even
3 though the order would still remain reviewable on appeal.
4 That's the difference.

5 JUDGE FURMAN: Let me interrupt for a second. The
6 President made the decision to wait until July 21st to issue
7 this memorandum. If he had issued it on March 30, prior to
8 census technically beginning altogether, would you still be
9 making this argument, or is this argument essentially dependent
10 on the fact that the President, for whatever reason he may or
11 may not have had, waited until the census was near over? And
12 indeed, the Census Bureau decided to shorten the period of the
13 census. So in other words, can it be that the President's
14 decision to essentially truncate the amount of time that is
15 remaining with this memorandum in place, that that undermines
16 the ability of the plaintiffs to challenge this?

17 MR. JOSHI: I will directly answer that question, but
18 let me just recite the premise a little bit. Under *Franklin* he
19 could have done this in the ten days between December 31 and
20 January 10. In fact, I would say it was laudable this was
21 announced in advance and allows the Secretary to do work in a
22 less expedited timeframe. And *Franklin* makes clear that that's
23 a perfectly permissible way to go.

24 JUDGE FURMAN: Mr. Joshi, that's not what he did, and
25 also had he done that, had he waited until October 1st when the

K93TSTAC

1 census is technically over, there would have been no argument
2 that this could affect the ongoing census count itself.
3 Instead, he made the decision to issue this memorandum with
4 essentially only one month remaining, but time remaining
5 nonetheless. So we're now confronted with declarations that
6 say this is having a demonstrable effect on the ongoing census
7 count. You haven't countered those declarations. You didn't
8 ask for a deposition of those witnesses. Are we not required,
9 in essence, to rely on that, that it is having ongoing harm?

10 MR. JOSHI: No, for two reasons. One, to answer your
11 earlier question, I think we would be making the same
12 traceability argument in the sense that there's a meaningful
13 difference here between someone who looks at the citizenship
14 question and being asked to answer it, and then as a result
15 chooses not to answer the question and to throw away the form,
16 and someone who is looking at the census form and is concerned
17 about an entirely different document that deals with
18 post-processing of the census data.

19 But to your second question, in terms of the
20 declarations, I do think we have evidence in the record.
21 Dr. Abowd's declaration helps us in two ways: Number one, on
22 the summary judgment posture, if that's what you're considering
23 right now, you have to take the facts in the light most
24 favorable to us. And two, Dr. Abowd's declaration makes clear
25 that when the census citizenship question was actually put to

K93TSTAC

1 the test by the bureau, and plaintiffs' experts don't even
2 address this study, it showed no statistically significant
3 decrease in response rates. So we think if you take that in
4 the light most favorable to us a *fortiori* the memorandum, which
5 is not even on the census, it's a completely separate statement
6 of policy, will not result in a substantial decrease in
7 non-response rate, which then shows that the census count
8 injury won't occur and is not traceable to the memorandum.

9 And of course I think as your Honor's questions
10 earlier on the diversion of resources under *Clapper* suggest, we
11 agree that you can't have a self-inflicted diversion of
12 resources injury if that diversion of resources are not
13 intended to counter something that is itself not a cognizable
14 injury. And here, as the census count injury is not cognizable
15 because it's neither traceable nor redressable, so too the
16 diversion of resources falls with it.

17 JUDGE FURMAN: This is Judge Furman. Let me follow up
18 on that particular point. Would that not render *Havens Realty*
19 essentially a dead letter or a null set? That is to say, how
20 could one ever have organizational standing by virtue of the
21 diversion of resources in the absence of another form of injury
22 that would itself suffice for standing purposes?

23 MR. JOSHI: I don't think so, your Honor, for a couple
24 of reasons. One, it's not that you have to have suffered the
25 other injuries, it's that the other injury, had it

K93TSTAC

1 materialized, would be cognizable, so hence the diversion.
2 You're not penalized for having prevented that. And I think
3 that's the principle that *Clapper* was getting at. It doesn't
4 undermine *Havens* because remember in *Havens* they had already
5 suffered the injury and then they were expending resources to
6 try to prevent the additional suffering of the injury,
7 including the informational injury in *Havens*. So *Havens* is
8 perfectly consistent with *Clapper*, and both of those cases
9 together do not support a diversion theory here.

10 Now if I might move on to -- I think that addresses
11 the standing and the ripeness issue, so I will move on to the
12 merits unless there are further questions on it.

13 So on the merits we're considering, of course, both
14 plaintiffs' summary judgment motion and our motion to dismiss.
15 So at the threshold, which I think is proper to start with, we
16 believe all the claims against the President and all of the APA
17 claims should be dismissed under *Franklin*; the APA claims
18 because there's no final agency action yet and the President is
19 not an agency, and then the claims against the President I
20 suppose we can talk about later in the relief, but under
21 *Mississippi v. Johnson* and under *Franklin* there simply can't be
22 the sort of relief against the President in the conduct of his
23 official act.

24 JUDGE FURMAN: Mr. Joshi, could I interrupt and ask
25 you: Can you address the facial challenge question? In your

K93TSTAC

1 brief you argue that it's the plaintiffs' burden to demonstrate
2 that, in essence, any or every illegal alien who would not be
3 counted, that that would be unlawful. Doesn't that get it
4 backwards, as Ms. Vale said? Isn't the question whether
5 there's anyone under the President's memorandum who would be
6 excluded who it would be unlawful to exclude; and if there is,
7 then the memorandum is either in violation of the statute or
8 the Constitution?

9 MR. JOSHI: With respect, I disagree, as you might
10 have expected. The memorandum itself is self-limiting. It
11 says to the maximum extent feasible and consistent with the
12 discretion delegated to the executive branch. And so as I said
13 when we were discussing ripeness, plaintiffs' choice to
14 challenge it right now means they have to show that if the
15 Secretary were to find it feasible to exclude only those aliens
16 without lawful status who have been paroled while waiting for
17 their removal to be effectuated, if that's all he finds then
18 that would be the question before the Court, whether that is
19 consistent with the discretion delegated to the executive
20 branch. By bringing the challenge now before we know what is
21 feasible and what the President has determined is within the
22 extent of his discretion, they are bringing a facial challenge,
23 and they have to show that there would be no set of such alien
24 whom the President could exercise its discretion to exclude
25 from the apportionment base if the Secretary were to find it

K93TSTAC

feasible.

So it really is a facial challenge, and I think *Texas v. United States* is most on point. There Texas passed a statute and what they wanted was to say: Look, which way we apply this statute, there would be no circumstances under which it would affect voting, and therefore we don't need Section 5 preclearance for it. And the Supreme Court said: No, we're not going to evaluate that right now, because I think the quote was, "We don't have sufficient confidence in our powers of imagination to affirm such a negative, and that the operation of the statute is better grasped when viewed in light of a particular application." So too here, we need to first see the application of this memorandum, we need to see what the Secretary finds is feasible and then see exactly what the President then excludes from the apportionment base. And then you will have an actual target, an actual application to evaluate. So I disagree.

JUDGE FURMAN: On the merits -- this is Judge Furman -- the Court has repeatedly looked to history in forming its understanding of constitutional provisions and, for that matter, statutory provisions. Can you identify any historical instance where the executive branch or the legislative branch or the judicial branch, for that matter, had taken the position that it would be lawful to exclude illegal immigrants from the census count or the apportionment base?

K93TSTAC

1 And I would note I think the Department of Justice
2 took the position that it would be unlawful in the 1980 *FAIR*
3 litigation. In the *Ridge v. Verity* litigation in 1989 there is
4 a six-page fairly thorough letter from an assistant attorney
5 general in the Department of Justice in 1988 commenting on a
6 bill that would have excluded illegal aliens from the
7 reapportionment count and explicitly took the position that
8 would be unconstitutional. There was a 1989 letter when the
9 current Attorney General was the assistant Attorney General for
10 the Office of Legal Counsel reaffirming that position. There's
11 an opinion of the Senate legal counsel in 1929, the year that
12 Congress passed the sort of modern Census Act, stating that it
13 would be unconstitutional. Is there any instance, any support
14 for the proposition that you are pressing here today in the
15 historical record?

16 MR. JOSHI: We have not been able to identify any.
17 But in *Franklin* there was a nearly unbroken 180-year history of
18 not including service members in the count, and nevertheless
19 Secretary Mosbacher made a different determination. And he did
20 so in the wake of at least nine bills that had been presented
21 in the 100th and 101st Congresses proposing to include such
22 service members, none of which made it very far. And
23 nevertheless, he exercised his discretion to do so, and the
24 President agreed, and the Supreme Court upheld that decision.

25 In this case I think what we point to is the original

K93TSTAC

1 meaning of "inhabitants" and the legal concept of "usual
2 residents" that the Supreme Court has explicated that we say
3 could be read, and in fact is most fairly read to exclude
4 aliens who don't have permission to stay and settle in the
5 country, that's the definition of "inhabitant," or who don't
6 have enduring ties because they could be removed at any time by
7 the sovereign.

8 On the other hand, I agree with you, plaintiffs' best
9 argument is history, and that cuts the other way. But I think
10 in the end when you compare those two together what it really
11 means is that the concept of persons in each state or
12 inhabitants or usual residents or those with allegiance or
13 enduring ties, all of these concepts are not particularly well
14 defined and therefore leave a considerable amount of room to
15 the executive to exercise his discretion.

16 Now the fact is the executive did not exercise that
17 discretion in the way that the memorandum here is exercising
18 it, but that doesn't make the exercise unlawful. There's no
19 laches on executive discretion or, for that matter,
20 congressional discretion over defenses. Of course the
21 executive branch's nearly unlimited discretion -- to use the
22 phrase in *Wisconsin* -- over the census operation is by
23 delegation from Congress. And Congress, of course, can take
24 back that delegation in whole or in part, temporarily or
25 permanently, at any time. So if this memorandum -- if the

K93TSTAC

1 President acts in accordance with this memorandum and delivers
2 the apportionment to Congress on January 10, they can
3 disapprove it. They can pass a bill and they can exercise the
4 discretion that the Constitution grants them.

5 JUDGE FURMAN: Mr. Joshi, this is Judge Furman.
6 Hasn't Congress already exercised that discretion in US Code
7 Section 2(a), that is, by directing the President to use the
8 whole number of persons in each state, quote, "as ascertained
9 under the decennial census of the population" to determine
10 apportionment? And by definition isn't it the case that if the
11 President uses anything other than the number given to him
12 pursuant to the residence rule, that is, subtracting any
13 category of illegal immigrant from that number, isn't it by
14 definition not consistent with that statute?

15 MR. JOSHI: No, for several reasons, and let me walk
16 through them, if I might. First, the substantive standard in
17 2(a) simply echoes the constitutional text, and I think it
18 would be a mistake to read it as being anything different from
19 the constitutional text, as far as the substantive standard.

20 As far as like whom to count, I think, with respect,
21 that just begs the question here, because remember in *Franklin*
22 the Supreme Court was very clear that the enumeration, the
23 thing that is the enumeration used to calculate the
24 apportionment is not final until the President says it is. And
25 so if you think about a case like *Franklin*, if the Secretary

K93TSTAC

1 delivers the census result that counted all the people he
2 thinks should have been counted to the President, and the
3 President turns around and says, "No, I disagree" -- so let's
4 say Secretary Mosbacher in *Franklin* had submitted a census that
5 included the overseas service members -- as he did, in fact --
6 and then had President Bush turned and said, "You know what? I
7 disagree with that policy. I'm going with what we have done
8 for 180 years, with very few exceptions, I don't want to
9 include them at all," Secretary Mosbacher would have gone back
10 within those ten days, subtracted those service members, sent
11 the new results back to the President, and he would have used
12 that in the apportionment. That's exactly what is happening
13 here. So it begs the question to say you're taking the --

14 JUDGE WESLEY: Mr. Joshi, there's a significant
15 difference though. The Secretary had made the allocation
16 determination and had counted service members and decided where
17 they were to be counted under the census. Here, the stated
18 policy is to draw a number outside of the census from data not
19 collected by the census itself and reduce the allocation as
20 determined by the census. This is not the President
21 disagreeing with some data that is within the census, this is
22 the President reducing the census. The census does not count
23 illegal aliens, does it?

24 When I filled out my questionnaire, it didn't ask me
25 if I was an illegal alien.

SOUTHERN DISTRICT REPORTERS, P.C.

K93TSTAC

1 MR. JOSHI: No, I don't understand --

2 JUDGE WESLEY: This is completely different. This
3 isn't *Franklin v. Massachusetts*, and I wonder why we have to
4 wait. The stated purpose is to draw a number outside of the
5 census and take it from the number that is produced by the
6 Secretary. It's not a disagreement with what the Secretary
7 provides to the President and then an alteration by the
8 President. He can do that, I agree with you, that's *Franklin*
9 *v. Massachusetts*, and it's not ripe until he makes that
10 decision. This is the stated policy that illegal aliens are
11 not to be counted, and yet they are counted, and now the
12 President is trying to find a way to take them out of the
13 number, but not from the data collected by the Census
14 Department, correct?

15 MR. JOSHI: No, I don't agree with that.

16 JUDGE WESLEY: Where is he getting the data from?
17 Where's he getting the data from? He's not getting it from
18 Census Bureau data, is he?

19 MR. JOSHI: With respect, your Honor, the Census
20 Bureau maintains and gets administrative records that Congress
21 has directed that they do to the maximum extent possible.

22 JUDGE WESLEY: Just answer my question, with respect,
23 please. Is the Census Bureau maintaining records in the
24 allocation and enumeration of illegal aliens?

25 MR. JOSHI: It is attempting to collect the

SOUTHERN DISTRICT REPORTERS, P.C.

K93TSTAC

1 information.

2 JUDGE WESLEY: I didn't ask you that, I said: Is it
3 maintaining records? I'm not asking whether it's asking other
4 agencies. Did it count illegal aliens as part of the census?

5 The answer is yes.

6 MR. JOSHI: So far, yeah.

7 JUDGE WESLEY: Right. Because they didn't ask anybody
8 if you were an illegal alien, did they?

9 MR. JOSHI: Correct.

10 JUDGE WESLEY: So now they're looking to figure out if
11 there's other data outside of the census to provide to the
12 President from which he could then deduce that there are
13 illegal aliens within the census count, is that correct?

14 MR. JOSHI: That is correct.

15 JUDGE WESLEY: And that is not *Franklin v.*
16 *Massachusetts*, is it?

17 MR. JOSHI: I disagree there.

18 JUDGE WESLEY: It is? You disagree why? Because in
19 *Franklin v. Massachusetts* the service members were counted, it
20 was the question of where they were to be allocated, wasn't it?

21 MR. JOSHI: So two responses to that, your Honor, if I
22 might, and I hope I can clear up some misunderstandings here.
23 Number one, the decision and the discretion that we're talking
24 about here is always binary, include or exclude, and it can't
25 possibly be that the executive discretion works only one way

K93TSTAC

1 like a ratchet. The decision to include is just the same kind
2 of exercise of discretion as the decision to exclude.

3 JUDGE FURMAN: Well, Mr. Joshi, let me --

4 MR. JOSHI: Sorry, I just want to clarify something,
5 if I might. I really apologize, but it's important.

6 In *Franklin* there was not a census taken of those
7 overseas service members. There was going to be an attempt to
8 do it and then DOD said in fact it wound up being infeasible,
9 so they counted those service members both to include in the
10 first place and then to allocate based on separate records
11 outside the census. So I disagree that it's anything unusual
12 here, it is just like *Franklin*. I just wanted to clear up that
13 misunderstanding.

14 I'm sorry, Judge Furman.

15 JUDGE FURMAN: Well, perhaps that answers the
16 question, but I wanted to tether it to language of Section 2
17 which requires the President to use the whole number of persons
18 as ascertained under the census. Isn't the case if the whole
19 number is determined by taking the census number, that is the
20 number as ascertained under the census, and subtracting a
21 number based on something totally unrelated to the census, that
22 it is no longer using the whole number of persons as
23 ascertained under the census?

24 MR. JOSHI: No, for the same reason I think I just
25 mentioned in *Franklin*. If you're taking the census and then

SOUTHERN DISTRICT REPORTERS, P.C.

K93TSTAC

1 adding, based on administrative records overseas service
2 members, you've done the same thing. Likewise, in *Utah v.*
3 *Evans* you're taking the numbers from the census and then you're
4 looking at gaps and then you're just imputing people into it
5 based on other administrative records and statistical formulas,
6 et cetera.

7 JUDGE FURMAN: But Mr. Joshi, you've made two
8 arguments repeatedly in your briefs. One is that the census
9 has never been conducted solely on the basis of questionnaires,
10 that the Census Bureau uses other things, administrative
11 records, imputation, et cetera, to produce the whole number of
12 persons. So in essence that's what happened in *Utah v. Evans*
13 and that's what happened in *Franklin*.

14 The second argument that you've made is the
15 President's memo has nothing to do with the census, that the
16 census is being conducted as it was prior to July 21st, and
17 that the Census Bureau will produce a whole number of persons
18 as ascertained under the census pursuant to the residence rule
19 and provide that information to the President. Doesn't it
20 follow *a fortiori* that if the Secretary provides another number
21 that it is not a number that is ascertained under the census?

22 MR. JOSHI: No, it doesn't, with respect, and here's
23 why: If this had proceeded as if under *Franklin*, let's say the
24 Secretary applies the residence criteria, delivers that number
25 to the President, the President turns and says, "I disagree, I

K93TSTAC

1 want you to give me a new number, to the maximum extent
2 feasible and consistent with the discretion delegated to me, to
3 exclude aliens who don't have lawful status under the INA."
4 The Secretary goes back, redoes the numbers using the
5 administrative records, just like in *Franklin* using the DOD
6 records, sends the new number back to the President. The
7 President says, "Ah-hah, yes, I like this, this is the now the
8 enumeration and the apportionment." What *Franklin* says is
9 that's when you get the actual census enumeration and
10 apportionment. The only difference here is that the Secretary
11 is providing both numbers in parallel rather than seriatim.
12 That's the only difference. But I don't think that's a
13 difference that violates Section 2(a).

14 JUDGE FURMAN: Unless Judge Wesley or Judge Hall have
15 other questions on the merits, maybe you should have a brief
16 word on remedies and then we'll go back for a brief rebuttal
17 from plaintiffs.

18 Judge Wesley?

19 JUDGE WESLEY: I'm fine, thank you.

20 JUDGE FURMAN: Judge Hall?

21 JUDGE HALL: I'm fine as well.

22 JUDGE FURMAN: Why don't you wrap up, Mr. Joshi, by
23 addressing the remedies question.

24 MR. JOSHI: I'm happy to do that. If I might just add
25 one sentence, I think since we do have our motion to dismiss

K93TSTAC

1 here as well, I would just say that the Section 195 sampling
2 claim should be dismissed because the memorandum says nothing
3 about sampling. The Tenth Amendment claims I think should be
4 dismissed because it doesn't coerce or even ask States to do
5 anything. And we think equal protections claims are deficient
6 under the *Regents* case because it tends to bootstrap statements
7 that are far removed in time and context.

8 So on remedies, as I mentioned earlier briefly, we
9 think there's no relief possible against the President under
10 *Franklin* and under *Mississippi v. Johnson* because there cannot
11 be such relief against the President in the conduct of his
12 official duty.

13 Now there is an open question, and I disagree with my
14 friend Mr. Ho that we conceded, but there is an open question
15 as to whether such relief could lie for purely ministerial
16 acts. But this is not ministerial, as *Franklin* makes clear.
17 Although the mathematical formula might be ministerial, picking
18 what number you plug into that formula is certainly not
19 ministerial, and that's what we have here. We're picking what
20 number goes in based on a policy judgment about who should be
21 included. So under those cases, no relief against the
22 President.

23 JUDGE FURMAN: This is Judge Furman. Does that not
24 open the door to precisely the political chicanery, to use
25 Justice Thomas' language, that the Census Act was prevented to

K93TSTAC

1 prevent? In other words, my understanding of the history if
2 not the language of the statute is that Congress wanted this
3 performed by a constitutional officer but effectively limited
4 that role to one that could be done with simple arithmetic.

5 If you're saying that as a matter of policy the
6 President could basically decide only people from red states
7 count in the census and that's a policy decision, doesn't that
8 precisely result in the political chicanery that the act was
9 intended to prevent?

10 MR. JOSHI: I disagree for a couple of reasons. One,
11 I think there's a difference between determining the
12 enumeration based on policy judgments. And then the second
13 step from enumeration from apportionment, there is a different
14 policy judgment that's involved there, and I think the
15 *Department of Commerce v. Montana* case probed that aspect.
16 What Congress has done is exercised its discretion and made the
17 policy judgment as to that second theme, as to the enumeration
18 to apportionment calculation, but it is still left to the
19 President the discretion on policy for determining the
20 enumeration itself, as *Franklin* and *Utah v. Evans* makes clear.

21 But there are also -- as we said, the President has
22 discretion, and *Wisconsin* calls it virtually unlimited, but it
23 is not unlimited, and it might be limited by other
24 constitutional doctrines, of course. So if the President says,
25 "I refuse to count any one of a certain race or religion," we

K93TSTAC

1 think that would be not within his discretion. That's far
2 removed from, obviously, the situation here.

3 Now in terms of the final question that the Court
4 issued, which is if there is no relief against the President
5 could there be any other effective relief, I think that is a
6 difficult question. But ultimately we agree that in *Evans* the
7 court found it sufficient to presume that the President would
8 be substantially likely to abide by an injunction against the
9 Secretary, even though he wouldn't be bound by it, and nothing
10 in the record here would cast doubt on that presumption. So
11 although the government obviously already did the opposite in
12 *Evans* and *Franklin*, we think this Court would just follow the
13 course there. But it is important to say, in answer to the
14 Court's question, assuming you were to get this on the
15 threshold issue then the merits, which we don't think you
16 should, what such relief might look like.

17 And I think it's important to note that any such
18 injunction, preliminary injunction against the Secretary, could
19 not prevent him from providing the information that the
20 memorandum asks him to provide. In fact, if you read the
21 actual memorandum, what it directs the Secretary to do is,
22 quote, "The Secretary shall take all appropriate action,
23 consistent with the Constitution and other applicable law, to
24 provide information permitting the President, to the extent
25 practicable, to exercise discretion to carry out the policy."

SOUTHERN DISTRICT REPORTERS, P.C.

K93TSTAC

1 And under the opinions clause, the President can demand in
2 writing the opinion on any subject relating to the duties of
3 the office, and this would plainly qualify under that.

4 JUDGE FURMAN: Mr. Joshi, let me ask you one final
5 question, unless my colleagues have a question on that. You
6 invoke the opinions clause in a footnote in your brief. I
7 think this Court, the Second Circuit and the Supreme Court have
8 generally taken the view that that's not sufficient to present
9 an argument. Why should we not view that argument as having
10 been waived?

11 MR. JOSHI: Because, your Honor, first of all, we did
12 raise it in our affirmative motion. It was a combined brief,
13 of course, so it's hard to separate.

14 JUDGE FURMAN: In a footnote.

15 MR. JOSHI: That is true, it was in a footnote, but we
16 didn't take necessarily plaintiffs to be asking to prevent the
17 transmittal of even information, we take plaintiffs to be
18 asking -- and we think an injunction would have to be so
19 limited to simply saying that the second set of numbers cannot
20 properly serve as the enumeration for the apportionment
21 purposes. That would be the limits of what the injunction
22 could do. It couldn't actually prevent the Secretary from
23 doing the work to provide the information.

24 In this respect, Judge Furman, I respectfully point to
25 the decision in the prior census litigation. I think at the

K93TSTAC

1 end of that trial there you were clear in your order, or I
2 thought it was, that the government could not actually include
3 the citizenship question on the census questionnaire, but you
4 clearly said that we were not enjoined from taking other
5 preparatory steps to prepare to include it as long as we didn't
6 take that final step. And I think that would be analogous to
7 this situation here.

8 And really I think I would like to close by saying an
9 injunction that said: Secretary, the second set of numbers
10 called for by the memorandum would be unconstitutional or *ultra*
11 *vires* if it were to serve as the enumeration number for
12 purposes of the apportionment base. I think just saying that
13 demonstrates the problem with this case, which is you don't
14 have the second set of numbers and you couldn't possibly say
15 exactly what the problem with it is.

16 And I think that just underscores why this case is not
17 ripe at this moment. We should wait to see what is feasible,
18 what those numbers are, and then the case can proceed exactly
19 as *Franklin* proceeded, exactly as *Evans* proceeded, exactly as
20 *Wisconsin v. New York* proceeded. And the one case that
21 plaintiffs have identified that was litigated beforehand was
22 *Department of Commerce v. House of Representatives* dealing with
23 statistical sampling which expressly provides a cause of action
24 pre-enumeration.

25 So for all those reasons we think you should dismiss

K93TSTAC

1 the case at the threshold, but at a minimum no relief against
2 the President and only limited preliminary injunctive relief
3 against the Secretary if you disagree.

4 THE COURT: Thank you, Mr. Joshi.

5 We'll hear briefly from Ms. Vale and/or Mr. Ho, but I
6 emphasize "briefly."

7 MS. VALE: Yes, your Honor, this is Judith Vale. I
8 will try to be brief.

9 First, I do want to touch on the point that another
10 reason why the memorandum is both unconstitutional and a
11 violation of the statute is that defendants are untethering the
12 apportionment from the actual enumeration. That is what they
13 are doing, and it is what they have said they are doing.
14 Director Dillingham in his sworn testimony to Congress said
15 that the memorandum has nothing to do with our operation right
16 now with the census, we're counting everybody, it has to do
17 with the tabulation that has been requested on apportionment.

18 In the joint letter that we submitted earlier,
19 defendants also said, unlike the citizenship question,
20 plaintiffs are not challenging a procedure that will be used in
21 the actual census but an apportionment number that will be
22 chosen by the President after the census is complete. And that
23 is quite different from what happened in either *Franklin* or
24 *Utah* where it is true that in *Franklin* and *Utah*, and during the
25 census process of counting who usually resides here, the Census

K93TSTAC

1 Bureau does use information from administrative records or
2 imputation, but that was as part of deciding who usually
3 resides here.

4 And that's not what is going on here. That is not
5 what defendants have represented that they are doing. They are
6 going to do the count, they are going to find out who usually
7 resides here. They are going to count undocumented immigrants
8 as usually residing here using not just the questionnaire but
9 all of the census processes that they use, and then when that
10 is done they're going to give that number to the President.
11 And separate from that, they are getting another number that
12 the President will use to subtract. That is unconstitutional
13 because I think it is undisputed that the actual enumeration
14 has to be the basis for apportionment, and it also violates the
15 statute.

16 The second point I just want to hit quickly is on the
17 claim about this being infeasible, and in particular that
18 plaintiff has said it might be infeasible. What we said is
19 that we don't think defendants can do this accurately. We
20 don't think they can actually accurately do a head count of
21 every single undocumented immigrant. But doing it,
22 implementing it and doing it well are not the same thing. And
23 I think we have every indication from both the citizenship
24 question case and what defendants have said so far that they
25 will go forward even if there are serious questions about

K93TSTAC

1 whether their numbers are accurate. They said they might only
2 abandon course if it's infeasible. They have not said they
3 would abandon course if there were questions about accuracy.

4 In any event, it's really rank speculation from
5 defendants to suggest that they are actually going to give the
6 President some small subset of numbers rather than do
7 everything that they can to count as many undocumented
8 immigrants as they can. And they have provided no proof, no
9 information whatsoever to suggest that they are going to
10 provide a subset of numbers. And that absence of proof is
11 entirely self-inflicted during the time that's gone by when
12 presumably the Census Bureau has been working on this, as
13 Dr. Abowd and Director Dillingham have said. They have
14 provided no evidence whatsoever to suggest that what is really
15 going to happen is a smaller number.

16 And so the question of what the memo says right now on
17 its face is that the decision of the President as of right now
18 is to exclude all undocumented immigrants. And even if that is
19 some sort of facial challenge, which we obviously disagree
20 with, there is no set of circumstances under which excluding
21 undocumented immigrants based solely on their immigration
22 status rather than their usual residence is constitutional or
23 lawful.

24 JUDGE FURMAN: Thank you, Ms. Vale.

25 MS. VALE: The last thing I was going to say was just

SOUTHERN DISTRICT REPORTERS, P.C.

K93TSTAC

1 on ripeness that we should also balance not just the hardship
2 to the plaintiffs but the fact that there is no hardship to
3 defendants from resolving this now and getting it right the
4 first time.

5 JUDGE FURMAN: Thank you, Ms. Vale.

6 Let me check with my fellow panelists to see if they
7 have any final questions, and otherwise we'll wrap up. Judge
8 Wesley?

9 JUDGE WESLEY: No, thank you very much, counsel.
10 Thank you all, counsel. I gave you a rough time at times but I
11 appreciate your honest answers. Thank you.

12 JUDGE FURMAN: Judge Hall?

13 JUDGE HALL: No. My thanks to counsel as well, but no
14 further questions. Thank you.

15 JUDGE FURMAN: In that case, let me close by thanking
16 counsel as well for your very helpful briefs and oral argument,
17 and we will reserve decision and try to give you a ruling as
18 soon as we can. And with that, I wish everybody a good day and
19 stay safe. Thank you very much.

20 (Adjourned)
21
22
23
24
25